



March 20, 2012

## Supreme Court Takes Up the Health Care Law

### The Arguments That Can Take It Down

Beginning Monday, March 26, the Supreme Court will hear six hours of oral arguments over three days on key components of the Affordable Care Act (ACA). The case comes almost two years to the day after President Obama signed the legislation into law. While there have been nearly 30 different legal challenges to various aspects of the ACA, the Supreme Court has agreed to hear arguments on four issues that are closely related to Congress's constitutional authority to enact the law.

**Issue #1: Anti-Injunction Act** – *Whether the law can be challenged until a tax from the mandate is levied in 2015.*

**Issue #2: Individual Mandate** – *Whether Congress has the authority to force Americans to purchase health insurance.*

**Issue #3: Severability** – *Whether other portions of the law are struck down if the mandate is found to be unconstitutional.*

**Issue #4: Medicaid Expansion** – *Whether Congress can compel states to accept the law's expansion of Medicaid coverage.*

### Issue #1: Anti-Injunction Act

On Monday, March 26, the Court will hear 90 minutes of arguments on whether the Anti-Injunction Act of 1867 (AIA) forbids challenges to the individual mandate until the law takes effect, on the theory that the mandate and its penalty are a form of taxation. This is a jurisdictional question the Court is obligated to consider. **The AIA prohibits taxpayers from challenging a federal tax until it has gone into effect and has been assessed or collected.**<sup>1</sup>

In several lower court cases, the Obama Administration argued that the AIA blocked lawsuits against the individual mandate. Every district court to address the issue rejected the government's argument and permitted the challenges. The Fourth Circuit Court of Appeals,<sup>2</sup>

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<sup>1</sup> 26 U.S.C.A. § 7421(a) (providing "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.")

<sup>2</sup> *Liberty Univ., Inc. v. Geithner*, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011)

however, found that the AIA barred suits against the law for now. Importantly, in a dissenting opinion Judge Brett Kavanaugh of the Court of Appeals for the District of Columbia also found that the AIA is a jurisdictional bar to challenging the ACA.<sup>3</sup>

The conclusion that the AIA bars the suits was based on the reasoning that the ACA requires a tax penalty that is enforced by the U.S. tax code and is collected in a manner consistent with tax collections. Where this issue becomes complicated is whether the mandate resembles a tax (“calculated as a percentage of income and administered through the tax collection system”<sup>4</sup>), or whether it is, as President Obama insisted, “absolutely not a tax.”<sup>5</sup> **The decision on whether the penalty attached to the individual mandate is a tax or not will affect the decision on whether or not that mandate is constitutional.**

Because the administration dropped the Anti-Injunction argument at the appellate level, when the cases arrived at the Supreme Court no party argued that the Anti-Injunction Act barred the suits. The Supreme Court, however, chose to address the issue and appointed an attorney to argue it. **If the Supreme Court finds that AIA prohibits challenges to the Affordable Care Act at this time, Americans will have to wait until 2015 when penalties are assessed to challenge the law on those grounds.**

## **Issue #2: Constitutionality of the Individual Mandate**

On Tuesday, March 27, the Court will hear 120 minutes of arguments on whether requiring people to purchase health insurance is permitted by the U.S. Constitution. **The biggest controversy involved in challenges to the ACA focuses on a provision of the law requiring minimum coverage, more commonly referred to as the mandate, which creates a legal duty for people to obtain health insurance by 2014.**<sup>6</sup> Under the ACA, the government penalizes with a fine those who decline to purchase health insurance.<sup>7</sup> Whether or not the individual mandate is determined to be constitutional depends on whether it is considered to merely regulate economic activity, as the administration has argued in its briefs, or whether the requirement forces people to purchase a particular product.

The Obama Administration argues that Congress chose the mandate as a mechanism to regulate the economic enterprise of providing health insurance in the same way that it regulates activity in interstate commerce. **Challengers to the ACA, including 43 Republican Senators, argue that Congress reached more deeply into Americans’ personal lives than it ever has before by compelling economic activity where no connection to interstate commerce exists.** Thus, whether Americans want it or not, they will be compelled to purchase a product – health insurance – or pay a penalty. Significantly, the administration’s reading of the Commerce

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<sup>3</sup> *Seven-Sky v. Holder*, 661 F.3d 1 (DC Cir. 2011) (J. Kavanaugh dissenting)

<sup>4</sup> “The Health Care Law Is Constitutional,” by Erwin Chemerinsky, SCOTUSblog, August 5, 2011, <http://www.scotusblog.com/2011/08/the-health-care-law-is-constitutional>

<sup>5</sup> Interview with Barack Obama, ABC News, Sept. 20, 2009, <http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/>

<sup>6</sup> See, ACA Section 1501(b)

<sup>7</sup> See, ACA Section 1501(b)(1)

Clause has no limiting principle, meaning that if the mandate is upheld by the Court, this clause of the Constitution could be used to prescribe any conduct as seen fit by Congress.

The Eleventh Circuit Court of Appeals struck down the individual mandate provision, reasoning that Congress did not have the constitutional authority to enact the provision. This ruling was later conflicted by rulings from the Sixth Circuit Court of Appeals and the D.C. Circuit Court of Appeals, which held the mandate to be constitutional. In the case before the D.C. Circuit, Judge Lawrence Silberman reasoned that that the Supreme Court's Commerce Clause jurisprudence permitted Congress to require Americans to purchase a product or service, although he conceded it "seems an excessive exercise of legislative power."<sup>8</sup>

**If the mandate is not struck down by the Supreme Court, it goes into effect on January 1, 2014.**

### **Issue #3: Severability of the Individual Mandate**

On Wednesday, March 28, the Court will address for 90 minutes whether the individual mandate is indispensable to other portions of the ACA. **When any portion of a law is found unconstitutional, a court may "sever" the unconstitutional provision and leave the remainder of the law untouched. Or, if the unconstitutional provision is so interconnected with the remainder of the law that the law cannot be properly executed without the provision, the court may strike down the law as a whole.** The severability of a provision is a dual question of whether the act can function properly without the unconstitutional provision and whether Congress intended for it to do so. If the Court finds the individual mandate is unconstitutional, it must decide if and how much of the ACA remains valid.

The ACA was enacted after explicit congressional insistence that the mandate is essential and after complex negotiations to secure votes. The Obama Administration has argued that if the Court strikes down the mandate, two key provisions of the ACA should also be struck: "the requirement that insurers cover all applicants and that they use a 'community rate' that ignores a person's health status for underwriting."<sup>9</sup> **Challengers argue that, given the essential nature of the mandate to the ACA, if it is not upheld the law should be struck down in its entirety.** The Eleventh Circuit Court of Appeals ruled that the remainder of the ACA was severable from the individual mandate.

Because both sides to the case agree that some or all of the remaining provisions of the ACA cannot survive without the mandate, the Supreme Court appointed a separate attorney to argue this point.

### **Issue #4: Medicaid Expansion**

On Wednesday, March 28, the Court also will hear 60 minutes of arguments on the coercive power of the federal government to impose Medicaid requirements on the states. Under the

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<sup>8</sup> *Seven-Sky*, 661 F.3d at 54

<sup>9</sup> "Health Law Issues Go Beyond Mandate," by Jason Millman, Politico, March 11, 2012

ACA, states will be obligated to expand Medicaid coverage to individuals who earn up to 133 percent of the federal poverty level starting in 2014. While the administration argues that participation by the states in Medicaid is voluntary, challengers to the law assert that opting out of the program is almost impossible because Medicaid is one of the states' biggest expenditures. One of the core tenets of modern federalism is that the federal government may not use state and local governments as instruments to impose federal legislation. In particular, the federal government may not use its spending power to coerce states into carrying out federal law.

**Congress may attach conditions to federal funds, but those conditions may not be “so coercive as to pass the point at which pressure turns into compulsion.”<sup>10</sup> Many states argue that ACA’s expansion of Medicaid presents just this type of coercion.** States would lose *all* Medicaid funding if they failed to comply with the ACA, bankrupting their Medicaid programs and devastating local health care systems in some states.

No federal law has been found to violate this limit on coercive federal spending since the principle was established, nor have any of the courts in the ACA litigation found the state mandate to violate this limit. However, **the ACA brought about the largest expansion of the largest state-federal program, so the Supreme Court will be paying close attention to this coercion argument.**

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<sup>10</sup> *South Dakota v. Dole*, 483 U.S. 203, 204 (1987)